Filed 6/8/17 Skerston v. Law Office of Robert Newman CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PAULA SKERSTON, Plaintiff and Appellant, v. LAW OFFICE OF ROBERT NEWMAN, Defendant and Respondent.	G053031 (Super. Ct. No. 30-2015-00772438) O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County, Frederick P. Aguirre, Judge. Affirmed.

Paula Skerston, in pro. per, for Plaintiff and Appellant.

Robert Newman, in pro. per., for Defendant and Respondent.

INTRODUCTION

Appellant Paula Skerston's current foray into the legal system began when she filed a complaint against "Law Office of Robert Newman, a Suspended Corporation" on February 19, 2015. This complaint accused respondent Robert Newman of false light invasion of privacy and infliction of emotional distress for replying to a review Skerston had posted on Yelp[1] by stating, "In 2007, I obtained a restraining order for a client against Paula Skerston, who is an attorney: Ms. Skerston appealed the trial court's ruling issuing a restraining order against her. Ms. Skerston lost the appeal. Read one of the court's related rulings here," followed by a link to a ruling. The link was to this court's ruling of February 24, 2012. The complaint alleges, at length, that the 2007 restraining order was obtained by false statements.

But while this is a new skirmish, it is only the latest salvo in a battle over the 2007 restraining order that has been going on now for over a decade. Each time Skerston has contested it, claiming it was obtained through falsehoods, she has lost. This appeal represents yet another loss. It also represents Skerston's disregard of our strong adjuration from further litigation the last time she was here: "This should therefore be the last of the appeals by Skerston [of the 2007] restraining order."

We affirm the dismissal of the latest complaint based on the 2007 restraining order. We also affirm the order declaring Skerston to be a vexatious litigant and the order requiring her to obtain a prefiling order. And, upon motion of her long-suffering opponent we finally impose sanctions for a frivolous appeal.

We grant Newman's motion and impose sanctions on Skerston in the amount of $5,000 payable to Newman, and $500 payable to the court.

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[1] Skerston's Yelp review allegedly stated, "Robert Carl Newman is my former attorney. I would never hire him again."

FACTS

As we explained in our last opinion involving Newman and Skerston, Newman obtained a restraining order against Skerston on behalf of his client Linda Sheehan in 2007. Skerston appealed from the restraining order, and we affirmed the order in 2008.[2] The restraining order was set to expire in 2010, and just before it did, Skerston filed a complaint against Newman and Sheehan based on Newman's activities while representing various clients, including Sheehan, in cases against Skerston. The 2007 restraining order, and the allegedly false statements made to the trial court to get it, played a prominent role in this complaint.

The defendants filed an anti-SLAPP motion under Code of Civil Procedure section 425.16.[3] The court granted this motion, and we affirmed, in February 2012.[4] Among other observations, we explained in some detail that the litigation privilege of Civil Code section 47 protected all of the statements alleged in Skerston's 2010 complaint even if the statements were, as alleged, completely false. We naively thought we had seen the end of Skerston's proceedings involving the 2007 restraining order.[5]

Events proved us wrong. Using Newman's response to her Yelp review as an entree, Skerston once again filed a complaint seeking to hold Newman accountable for the statements made to obtain the 2007 restraining order, this time under a false light/invasion of privacy theory.

Skerston's latest complaint also alleged that Newman breached his fiduciary duty to her as her former attorney in 2000 by posting the reply to her Yelp review. In 2009, Skerston sued Newman for intentional infliction of emotional distress,

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[2] *Sheehan v. Skerston* (Dec. 3, 2008, G039592) [nonpub. opn.].

[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[4] *Skerston v. Sheehan* (Feb. 24, 2012, G045401) [nonpub. opn.].

[5] Between the 2008 opinion affirming the 2007 restraining order and the anti-SLAPP dismissal affirmed in 2012, Skerston also appealed from an order denying her motion to vacate the restraining order on grounds of extrinsic fraud. She lost that appeal too. (*Sheehan v. Skerston* (July 25, 2011, G044539) [nonpub. opn.].)

based in large part upon the statements made in the application for the 2007 restraining order and during testimony regarding the order. Among other allegations, Skerston alleged that Newman had been her attorney in 2000, and his representation of Sheehan in the matter of the 2007 restraining order created a conflict of interest and violated his ethical duties to her as his client as well as the Business and Professions Code. According to Skerston's 2009 complaint, Newman "owes her a high duty not to cause her injury. He violated ethical rules of conduct by doing all of the above mentioned conduct against Skerston." The trial court granted Newman's anti-SLAPP motion to strike the complaint in December 2009.[6]

In the present case, Newman filed a case management statement on May 27, 2015, informing the court that his professional corporation no longer existed. Instead, he practiced law as Law Office of Robert Newman under a business license.[7] The court held a case management conference on June 1, attended by both Skerston and Newman. The court struck Newman's case management statement, because he had not filed an answer. The court continued the case management conference to June 22.

Newman then filed a demurrer to the complaint and another case management statement that again informed the court that the named defendant corporation did not exist. He filed his motion to declare Skerston a vexatious litigant a few days later, accompanied by a request for judicial notice.

Newman's request for judicial notice listed six "litigations" filed by Skerston in propria persona since 2009, including two notices of appeal in this court (opinions issued in 2011 and 2012), a petition for a rehearing of the last appellate decision (denied in 2012), two complaints (filed in 2009 and 2010), and the motion to set aside the 2007 restraining order that was the subject of the 2011 appeal. All had been

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[6] We have taken judicial notice of the complaint in *Skerston v. Newman*, Orange County Superior Court case No. 30-2009-00308503.

[7] Skerston's 2009 complaint for intentional infliction of emotional distress named Newman and Law Office of Robert Newman as defendants.

decided adversely to Skerston. All dealt with the restraining order and the allegedly false statements made to obtain it.

The court held another case management conference on August 17, 2015, again attended by both parties. The court found that Robert Newman individually doing business as Law Office of Robert Newman was the correct defendant. It continued the hearing on Newman's demurrer and motion to strike and his vexatious litigant motion to the end of September. On its own motion, the court set an order to show cause (OSC) for the same date to determine whether Skerston was a vexatious litigant and ordered her to file a list of all state and federal civil actions commenced or maintained by her in the last seven years, except for small claims actions.

After a hearing, the trial court granted Newman's motion to have Skerston declared a vexatious litigant and its own motion pursuant to the OSC. The court ordered Skerston to provide security in the amount of $15,000 in order to proceed with her latest complaint. When she failed to post this amount with the court, her complaint was dismissed.

DISCUSSION

Skerston has identified two main issues on appeal. First, she asserts Newman had no standing to bring the motion to have her declared a vexatious litigant. Second, she claims the court improperly declared her to be a vexatious litigant, required her to post security to go forward with her suit, and dismissed her suit when she did not do so.

I. Newman's Standing

Skerston based her argument on the standing issue on the fact that she named "Law Office of Robert Newman, a Suspended Corporation" as the defendant in the original complaint. She asserts that Newman, the party who filed the vexatious litigant motion, lacked standing to do so because the corporation, not Newman

individually, was the only named defendant.[8] She also complains that Newman was required to file a noticed motion or a complaint in intervention in order to be considered as an individual defendant. The record does not indicate that she raised this latter objection in the trial court.[9]

The trial court addressed this issue at the August 18 case management conference. It determined that Newman was the true defendant.[10] Skerston did not include a reporter's transcript of this proceeding in the appellate record, and in the absence of a transcript we are required to assume that the evidence presented at the hearing supported the court's decision. (See *National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521-522; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385.)

Moreover, Skerston supplies no authority for her contentions that a noticed motion or a complaint in intervention was required before Newman individually could be recognized as the true defendant, or even that Newman was *not* the true defendant. (See *Denna v. Red River Lumber Co*. (1941) 47 Cal.App.2d 235, 238 [defunct corporation improperly named as defendant].) Arguments not supported by citations to legal authority are deemed waived. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852*; Department of Alcoholic Beverage Control v. Alcoholic Beverage Control*

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[8] Skerston devotes a significant portion of her opening brief arguing that Newman violated Revenue and Taxation Code section 19719 by filing a case management statement on the corporation's behalf. This statute is a criminal statute, imposing fines and/or jail time on anyone attempting to exercise the powers, rights, and privileges of a corporation suspended for nonpayment of taxes. Newman, for his part, asserted that his professional corporation no longer existed and that he operated as an individual doing business as Law Office of Robert Newman under a Santa Ana business license. Skerston does not specify what she expects us to do about this supposed violation of the statute.

[9] Skerston filed an ex parte application to have her motions to strike the vexatious litigant motion heard at the same time as Newman's motion. This is the only document in the record mentioning an objection to Newman's standing. The ex parte application was denied. Skerston's opposition to Newman's motion does not mention this issue.

[10] Skerston claims to have filed several documents relating to the status of Newman's corporation, but these documents do not appear in the record. She also claims she had no notice that this issue was up for decision even though she also contends she filed documents contesting Newman's claim about the status of his corporation and his standing to appear at the June 1 status conference.

Appeals Bd. (2002) 100 Cal.App.4th 1066, 1078; *Badie v. Bank of America* (1998) 67 Cal.App.4th 799, 785.)

Skerston's argument assumes that Newman was not the true defendant until the court ruled on the issue at the August 2015 case management conference. But if Newman the individual was erroneously sued as his corporation, he was erroneously sued from the beginning. The court's ruling in August did not substitute one defendant for another. It clarified the identity of the original defendant. (See, e.g., *Cummings v. Fire Ins. Exchange* (1988) 202 Cal.App.3d 1407, 1412, fn. 1.)

Skerston also overlooks the fact that the court set an OSC on its own motion to declare her a vexatious litigant. Section 391.7 authorizes this procedure. Although this code section is prospective, it supports the court's underlying finding that Skerston qualifies as a vexatious litigant independently of Newman's motion. (See *Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1170 (*Shalant*).)

II. Vexatious Litigant Motion

"The vexatious litigant statutes (§§ 391-391.7) are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants." (*Shalant, supra,* 51 Cal.4th at p. 1169.) Section 391.1 provides, "In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security or for an order dismissing the litigation pursuant to subdivision (b) of Section 391.3. The motion for an order requiring the plaintiff to furnish security shall be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that

he or she will prevail in the litigation against the moving defendant."[11] A person who has been determined to be a vexatious litigant must post "security in such amount and within such time as the court shall fix" (§ 391.3, subd. (a)), and if the security is not posted, the court must dismiss the litigation. (§ 391.4.)

We review the trial court's ruling that a person is a vexatious litigant for abuse of discretion. We uphold the ruling if substantial evidence supports it, presuming that the order is correct. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 636.) We review the court's evaluation of the plaintiff's reasonable chance of success for substantial evidence. (*Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 828.)

A. Skerston Meets the Definition of Vexatious Litigant

The trial court found that Skerston met the definition of vexatious litigant as set forth in section 391, subdivision (b)(2) and (b)(3). That is, she continued to litigate a claim that had already been decided against her, and she repeatedly filed unmeritorious motions, pleadings or other papers. Skerston's sole argument regarding whether she qualified under the statutory definition is that two of the cases in Newman's list have not been finally determined.

Whether these two cases have been finally determined is irrelevant. Even without these two cases, Skerston has repeatedly relitigated or attempted to relitigate the 2007 restraining order, the validity of which was finally determined against her by this court in 2008. (See § 391, subd. (b)(2).) Since then we have had two more appeals and a

[11] Section 391, subdivision (b), defines "Vexatious litigant" as "a person who does any of the following: [¶] (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. [¶] (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined. [¶] (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay. [¶] (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence."

petition for rehearing about the restraining order in this court, and Skerston sued Newman in 2009, all based on the 2007 restraining order. Incredibly, Skerston is *still* arguing, in this appeal, that the 2007 restraining order was obtained by fraud.

Skerston has tried to relitigate her breach of fiduciary duty claim against Newman for the statements made and the testimony elicited in order to get the 2007 restraining order. This cause of action, then pleaded under intentional infliction of emotional distress, was decided adversely to her in 2009, yet she incorporates the same facts into the present complaint.

Skerston has also filed unmeritorious pleadings while representing herself: the last two appeals in this court, the petition for rehearing in this court, the 2009 complaint against Newman, and the complaint in this action. (§ 391, subd. (b)(3).)

Skerston meets the definition of vexatious litigant.

B. Skerston Has No Reasonable Probability of Prevailing

There are several reasons that Skerston has no reasonable possibility of prevailing. First, as we explained in what we hoped was excruciating detail in the 2012 opinion, the litigation privilege of Civil Code section 47 protects all statements made in connection with a judicial proceeding, even if they were false. The present complaint of false light/invasion of privacy is once again based on statements made in connection with the restraining order. Specifically, Skerston alleged that the statements made to obtain the order, e.g., that she was stalking and harassing Sheehan, placed her in a false light, because they were false. Whether they were false or not, they were absolutely privileged, and Skerston cannot base a lawsuit on them, no matter what theory she invokes.

As for the breach of fiduciary duty cause of action, based on Skerston's claims that the pleadings and statements made in connection with the 2007 restraining order violated Newman's ethical duties to her as his client, this claim was decided adversely to her in 2009. Under the principle of claim preclusion, Skerston cannot try again. (See *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823-824 (*DKN*

Holdings).) Skerston also presented no evidence that in representing Sheehan in 2006 Newman detrimentally used information and confidences acquired from Skerston when he represented her in 2000. (See *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573.) Thus she made no showing whatsoever that Newman's representation of Sheehan in an unrelated matter violated his duty to her as a former client.

Skerston argues on appeal that Newman presented no evidence in his motion regarding her probability of prevailing in this lawsuit. Her argument is unavailing for two reasons. First, she cannot prevail in this lawsuit for the same reason that she is a vexatious litigant – the subject-matter of this lawsuit has been previously litigated. Newman presented ample evidence that the gravamen of the present complaint – the alleged falsehoods he presented to the court to obtain the 2007 restraining order – has already been litigated time after time and decided adversely to Skerston. The principles of res judicata precluded her from bringing essentially the same lawsuit and litigating the same issues again. (See *DKN Holdings, supra,* 61 Cal.4th at p. 823.) Second, as stated above, in the absence of a transcript we are required to assume that the evidence presented at the hearing supported the court's decision. (See *National Secretarial Service, Inc. v. Froehlich, supra,* 210 Cal.App.3d at pp. 521-522; *Sui v. Landi, supra,* 163 Cal.App.3d at p. 385.)

Skerston further objects to the amount of the security she was required to post – $15,000. She asserts this number was pulled out of thin air, without any evidentiary support. We review the amount of security required for substantial evidence. (*Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571, 1587-1588, disapproved on other grounds in *Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 785.)

Once again, we refer to the rule that in the absence of a transcript, we must assume the evidence at the hearing supported the court's decision. Moreover, it is not accurate that Newman presented no evidence regarding monetary amounts. He referred

to the amounts he has had to expend on filing and motion fees ($2,000) and the number of hours he has devoted to responding to her frivolous lawsuits.

III. Vexatious Litigant OSC

Skerston also complains that the court improperly shifted the burden of proof to her by requiring her to list all of her state and federal actions in the last seven years before the hearing on the OSC. This complaint is without merit.

When the court issued the OSC, Newman had already filed his motion under section 391.1. He had already presented prima facie evidence of lawsuits and other pleadings that qualified Skerston as a vexatious litigant. In view of Skerston's scattershot litigation style, the court prudently tried to focus her on providing the information it needed to make an informed decision. This effort to focus Skerston's opposition did not shift the burden of proof to her.

The court was unsuccessful to some extent. While it excluded small claims cases from the OSC, Skerston supplied the names of these cases anyway.[12] The court also ordered Skerston to explain why the litigation privilege did not apply to her efforts to hold Newman accountable for the statements made to obtain the 2007 restraining order. Like the order exempting small claims cases from the list of litigations filed in the last seven years, this order was ignored. Skerston's opposition to the motion and the OSC did not address the litigation privilege at all.

The litigation privilege was relevant to the second condition to obtaining an order under section 391.3 – no reasonable probability of prevailing. Three of the four appeals and in the anti-SLAPP motion ending the 2009 emotional distress lawsuit against Newman featured the privilege. It was clearly a major issue in deciding both the motion and the OSC. The court was well within its discretion in ordering Skerston to address it.

[12] Section 391, subdivision (b)(1), excludes small claims cases from qualifying "litigations."

The trial court did not improperly shift the burden of proof to Skerston. Newman's evidence of her numerous court filings did that. In view of the fact that she ignored the bulk of the court's directive, she cannot now complain that the order handicapped her ability to oppose either Newman's motion or the court's OSC.

IV. Sanctions

Newman moved for sanctions for filing a frivolous appeal, and we gave notice under California Rules of Court, rule 8.276(c) that we were considering imposing them. Both Skerston and Newman addressed the issue during oral argument.

Section 907 provides," When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." One of the hallmarks of a frivolous appeal is that any reasonable attorney would agree it is totally and completely without merit, an objective standard. (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516.) "[W]here a party bases an appeal on an argument that has been rejected and sanctioned in another trial court and affirmed on appeal, the principle of 'once burned, twice shy' applies. That is the case here." (*Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 192.)

Actually, Skerston has been burned three times in this court, leaving aside her losses in the lower courts. Any reasonable attorney would long ago have given up trying to punish Newman for obtaining a restraining order, assuming that such an attorney would not have immediately recognized the futility of this effort. Skerston's decade-long crusade against Newman is the very definition of frivolous.

A frivolous appeal affects not only the person who must respond to it but also our court system as a whole. Parties with real issues must wait while we deal with specious arguments, and our already strained resources, paid for by taxes, are wasted. (See *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 35.)

Accordingly, we impose sanctions in the amount of $5,000 payable to Newman and $500 payable to the clerk of this court. (See *Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 830 [$6,000 conservative estimate of cost of processing average civil appeal].)

DISPOSITION

The order declaring Skerston to be a vexatious litigant is affirmed. The judgment dismissing the complaint is affirmed. Newman's request for judicial notice is granted. Newman is to recover his costs on appeal.

We find this appeal to be frivolous and assess sanctions against Paula Skerston as follows: (1) Sanctions in the amount of $5,000, payable to respondent Newman within 30 days of the issuance of the remittitur in this matter; (2) sanctions in the amount of $500, for the cost of processing this appeal, which sum shall be paid to the clerk of this court within 30 days of the issuance of the remittitur in this matter. This opinion constitutes a written statement of our reasons for imposing sanctions, as required by *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 654.

Pursuant to Business and Professions Code section 6086.7, subdivision (a)(3), the clerk of this court is ordered to forward a copy of this opinion to the State Bar of California upon return of the remittitur and to notify attorney Paula Skerston that the matter has been referred to the State Bar.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.